Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor

COURT OF APPEAL (KUALA LUMPUR) — APPLICATION NO W–08–205–94
GOPAL SRI RAM, SITI NORMA YAAKOB AND MAHADEV SHANKAR JJCA
22 FEBRUARY 1995

Civil Procedure *— Parties — Non-intervention of party — Party prejudiced by order of certiorari — Did not intervene to be added as a party at earliest opportunity — Knowledge and opportunity to do so — Whether could intervene at appeal stage later — Whether there was independent right of appeal — Rules of the High Court 1980 O 53 — Rules of the Court of Appeal 1994*

The applicant in this case, Tradium Sdn Bhd, is a property developer. One of its proposed developments, although approved by the second respondent, met with opposition from the first respondent. The first respondent applied to the High Court for leave to apply for an order of certiorari to quash the second respondent's approval ('the approval'). Although the grant of certiorari would affect the applicant financially, it made no attempt to intervene to have itself added as a party as it did not wish to face an order for costs in the event the first respondent suceeded in its application. Subsequently, the High Court judge granted the certiorari and quashed the approval. The second respondent appealed against the decision. It was only at this late stage that the applicant applied to add itself as a party for the purpose of appealing separately to the Court of Appeal. However, this application failed. The applicant did not appeal. Instead, it moved the Court of Appeal by a notice of motion for, inter alia, an order that it be permitted to intervene and take part as an intervener in the appeal on the following two grounds: (i) that the applicant had a right of appeal independant of any such right conferred upon the actual parties to the proceeding by virtue of O 53 r 4 of the Rules of the High Court 1980 read together with the Rules of the Court of Appeal 1994; and (ii) that there is an old Chancery practice that permits any person affected by a judgment to apply for leave to appeal and leave is usually granted by the English Court of Appeal in such circumstances.

Held, dismissing the appeal:

(1) Any person who may be aggrieved by the decision of the court may intervene and apply to be added as a defendant or respondent in the proceeding. It is then for the judge in the exercise of his discretion to decide whether or not to allow such a course.

(2) In this case, the applicant had the requisite knowledge and opportunity to intervene to have itself added as a party to the substantive motion, but failed to do so at the earliest opportunity.

(3) The applicant could not now claim to have an independent right of appeal. This is because pursuant to the principle founded on justice and common sense, if a person knowing what was passing but was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to reopen the case.

(4) A person who has been served with the notice or summons pursuant to O 53 r 2(5), may decide whether to confine himself to an address if called upon by the judge, or to go further and apply to have himself added as a party. If he chooses the former course, then he has exhausted all that the law gives him and cannot appeal with or without leave. In order to exercise the right of appeal, he must be added as a party.

(5) Resort and reliance upon the English practice was particularly unhelpful in this case, as the procedure governing appeals in England and those obtaining under our rules is very different.

[Bahasa Malaysia summary

Pemohon dalam kes ini, Tradium Sdn Bhd, merupakan pemaju hartanah. Satu daripada cadangan pemajuannya, sungguhpun ia telah diluluskan oleh responden kedua, menghadapi bantahan daripada responden pertama. Responden pertama memohon kepada Mahkamah Tinggi untuk kebenaran bagi membuat permohonan untuk perintah certiorari untuk membatalkan kelulusan yang diberi oleh responden kedua itu ('kelulusan tersebut'). Walaupun perintah certiorari tersebut jika dibenarkan akan menjejaskan kedudukan kewangan pemohon, pemohon tidak membuat apa-apapun untuk mencelah supaya ia ditambahkan sebagai suatu pihak dalam prosiding kerana ia tidak ingin menghadapi suatu perintah untuk kos jika responden pertama berjaya dalam permohonannya. Kemudiannya, hakim Mahkamah Tinggi telah memberikan perintah certiorari itu lalu membatalkan kelulusan tersebut. Responden kedua telah membuat rayuan terhadap keputusan itu. Hanya pada peringkat yang lewat ini baharulah pemohon telah memohon supaya ia ditambahkan sebagai suatu pihak bagi tujuan membuat rayuannya secara berasingan kepada Mahkamah Rayuan. Walau bagaimanapun, permohonan tersebut gagal. Pemohon tidak membuat rayuan. Sebaliknya, ia telah memohon kepada Mahkamah Rayuan melalui suatu notis usul untuk, antara lain, suatu perintah supaya ia dibenarkan mencelah dan mengambil bahagian sebagai seorang pencelah dalam rayuan itu atas dua alasan yang berikut: (i) pemohon mempunyai hak rayuannya sendiri, yang berasingan daripada sebarang hak yang diberikan kepada pihak-pihak sebenar di dalam prosiding itu mengikut A 53 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 dibaca dengan Kaedah-Kaedah Mahkamah Rayuan 1994; dan (ii) terdapat amalan Canseri lama yang membenarkan sesiapa yang dimudaratkan oleh sesuatu penghakiman untuk membuat permohonan untuk kebenaran

bagi membuat rayuan, dan kebenaran tersebut biasanya diberikan oleh Mahkamah Rayuan di England. A

Diputuskan, menolak rayuan itu:

(1) Sesiapa yang mungkin akan dimudaratkan oleh suatu keputusan mahkamah boleh mencelah dan memohon supaya dia ditambahkan sebagai defendan atau responden dalam prosiding. Kemudian, hakim akan menggunakan budi bicaranya untuk membuat keputusan sama ada permohonan itu dibenarkan atau tidak. B

(2) Dalam kes ini, pemohon mempunyai pengetahuan and peluang yang diperlukan untuk mencelah supaya ia ditambahkan sebagai satu pihak dalam usul substantif sejak awal lagi, tetapi gagal berbuat demikian pada peluang terawal. C

(3) Pemohon tidak boleh menuntut bahawa ia mempunyai hak rayuan yang berasingan sekarang. Ini adalah kerana mengikut prinsip yang berasaskan keadilan dan akal budi, jika seseorang itu tahu apa yang sedang berlaku, tetapi berpuas hati dengan berpeluk tubuh dan melihat sahaja pertarungannya diperjuangkan oleh orang lain yang juga mempunyai kepentingan yang sama dengannya, dia haruslah terikat dengan keputusannya dan tidak dibenarkan membuka kes itu semula. D E

(4) Seseorang yang telah disampaikan dengan notis atau saman mengikut O 53 r 2(5), boleh membuat keputusan sama ada untuk menghadkan dirinya kepada suatu penghujahan jika dipanggil oleh hakim, ataupun untuk mengambil langkah selanjutnya dan memohon supaya beliau ditambahkan sebagai suatu pihak. Jika beliau memilih jalan yang terdahulu, beliau dikira telah menghabiskan kesemua hak yang diberikan kepadanya di sisi undang-undang dan tidak boleh merayu lagi sama ada dengan kebenaran ataupun tanpa kebenaran. Agar beliau dapat menggunakan hak untuk membuat rayuan, beliau mesti ditambahkan sebagai suatu pihak. F G

(5) Rujukan dan pergantungan terhadap amalan Inggeris tidak dapat membantu apa-apapun dalam kes ini, kerana prosedur rayuan di England dan yang terdapat di bawah kaedah-kaedah di sini adalah sangat berlainan.]

H

Cases referred to

Nana Ofori Atta II v Nana Abu Bonsra II [1958] AC 95; [1957] 3 All ER 559; [1957] 3 WLR 830 (folld)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)
Securities Insurance Co, Re [1894] 2 Ch 410 (not folld) I
Selvamary v G Rethinasamy [1991] 1 MLJ 156 (refd)
Tong Swee King v Pegang Mining Co Ltd & Ors [1967] 2 MLJ 214 (refd)
Wytcherley v Andrews (1871) LR 2 P & D 327 (folld)

Legislation referred to

Rules of the Court of Appeal 1994
Rules of the High Court 1980 O 15 r 6(2), O 53 rr 2(3), (5), 4

Appeal from: Originating Motion No R1–25–118–92 (High Court, Kuala Lumpur)

DP Naban (*Lee Hishamuddin*) for the applicant.
Hj Sulaiman bin Abdullah (*Anita Sockalingam* and *Rajiv Vijayanathan* with him) (*Zain & Co*) for the first respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): On 16 January 1995, Encik DP Naban of counsel moved this court, by a notice of motion that stood in his name, for the following orders:

(a) that Tradium Sdn Bhd be permitted to intervene and take part as an intervener in the High Court of Malaya at Kuala Lumpur Originating Motion No R1–25–118–92 for the purpose of appealing against the order of the honourable High Court made on 26 October 1994 (hereinafter referred to as the 'said Order') pursuant to the Rules of the High Court 1980 read together with the Rules of the Court of Appeal 1994;

(b) that the title of the originating motion referred to above be amended for the purposes of the appeal to reflect the intervention by Tradium as an intervener in the motion; and

(c) that time for giving of the notice of appeal by Tradium against the said Order be extended by a period of seven (7) days from the decision of this honourable court granting leave as prayed in (a) above.

Now, I thought that rather odd because we were being asked to literally exercise original jurisdiction in this matter. But Encik Naban argued that he was relying on the language of O 53 of the Rules of the High Court 1980, and upon the practice on the Chancery side to maintain the application. In order to appreciate this rather peculiar situation which counsel had created for himself, it is necessary to recite some of the background leading up to the making of this application. In doing so, I will refer to the parties as they are described in the proceedings before us.

The applicant is a developer of property. One of its proposed developments, although approved by the second respondent, met with opposition from the first respondent. Unhappy with the decision of the second respondent's approval of the applicant's plans, the first respondent applied to the High Court for leave to move it for an order for certiorari to quash the approval in question. The applicant was not made a party to those proceedings. When the first respondent applied for leave, the usual order that leave does operate as a stay was also sought, but the learned judge who heard the application declined to make such an order, indicating to counsel that he may reapply if the circumstances warranted. The

circumstances must have so warranted, for, shortly thereafter, the first respondent applied for and obtained an ex parte order to stay all further proceedings on the second respondent's approval. The applicant got wind of the certiorari proceedings and, in particular, the order for stay. Its solicitors called for the cause papers and the first respondent's solicitors obliged by effecting service.

The applicant then applied by summons to intervene in the application, to quote Encik Naban, 'for the very limited purpose of setting aside the stay'. I may add that no attempt whatsoever was made by the applicant to have itself added as a party, although the application for certiorari really affected it in its pocket. As matters transpired however, the learned judge decided to proceed with the substantive motion. Consequently, the applicant's summons was not heard and was subsequently withdrawn.

Thereafter, the applicant, with the leave of the learned judge, participated in the proceedings and made submissions resisting the first respondent's motion to quash by certiorari. The opposition offered by the applicant and the second respondent proved futile: for the learned judge granted the orders sought and quashed the approval.

At that late stage, that is to say, after the decision on merits had been handed down, the applicant applied to the judge to add itself as a party for the purpose of separately appealing to us. Needless to say, that application failed. No appeal was lodged against that decision. Instead, the applicant moved this court in the manner alluded to earlier. For completeness, it may be added that on 23 November 1994, that is, one day before the motion that came before us was filed, the second respondent lodged its appeal against the grant of certiorari.

After hearing argument, we reserved our decision to 17 January 1995, at which time we dismissed the application, indicating that written reasons would be given.

Encik Naban defended his application to us on two grounds. First, he submitted that his client is one who falls within O 53 r 4. That rule reads as follows:

> On the hearing of any motion or summons under rule 2, any person who desires to be heard in opposition to the motion or summons and appears to the Court or Judge to be a proper person to be heard shall be heard nothwithstanding that he has not been served with the notice or summons.

The applicant, so the argument goes, therefore has a right of appeal, independent of any such right conferred upon the actual parties to the proceedings. Counsel submits that if he is right in his argument, then he should be given an extension of time to file and serve his notice of appeal.

Secondly, he submits that there is a Chancery practice of ancient repute that permits any person affected by a judgment to apply for leave to appeal and in such circumstances leave is usually granted by the Court of Appeal. He argues that the definition of the term 'appellant' in the Rules

of the Court of Appeal 1994 does not shut out his client from asking for leave to appeal.

In support of this second submission, counsel drew our attention to the following passage in the judgment of Lindley LJ in *Re Securities Insurance Co* [1894] 2 Ch 410 at p 413:

> Now, what was the practice of the Court of Chancery before 1862, and what has it been since? I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a prima facie case why he should have leave he will get it; but without leave he is not entitled to appeal.

It must be borne in mind that these words were spoken at a time when the wide jurisdiction to permit intervention in *all* original proceedings now contained in O 15 r 6(2) was absent. One must also keep in mind the very different procedure governing appeals in England and those obtaining under our Rules. Finally, there are the judgments of Ong Hock Thye FJ in *Tong Swee King v Pegang Mining Co Ltd & Ors* [1967] 2 MLJ 214 and Lord Diplock in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 (an appeal from the former) which point to the procedure available here.

In response to the submissions made by Encik Naban, Tuan Hj Sulaiman, counsel for the first respondent, submitted that it was always open to the applicant to have intervened and have itself added as a party to the substantive motion if it considered itself to be prejudiced by any order that may be made by the judge in the first respondent's favour. He says, quite correctly, that the applicant had the requisite knowledge and opportunity to take the necessary steps. Counsel submits that the applicant, with full knowledge of its rights, elected not to be an additional respondent to the proceedings and, having made a conscious election, it ought not to be permitted to now change its stance and allowed to play a fuller role.

At that stage, I asked Encik Naban why he did not enter the foray in full but chose a more limited intervention. He said that it was to protect his client from an order for costs in the event the first respondent succeeded in quashing the impugned approval.

Continuing with his argument, Hj Sulaiman submitted that it was a matter of discretion and that several factors weighed heavily against the applicant. These included, but were not limited to the following: (1) the applicant's failure to apply at the earliest opportunity to be added as a party; (2) the availability of the alternative course of applying to intervene in the second respondent's appeal, subject, of course, to the exercise of discretion of this court in such event; (3) the delay in coming before us; and (4) the making of a conscious election to make a limited intervention instead of choosing to play the role of an added respondent to the substantive motion.

I think that there is merit in the submission made on behalf of the first respondent. The applicant admittedly did not wish to face an order for costs. Nevertheless, while enjoying that protection, it attacked the first respondent's arguments before the judge. In my view, the applicant was no better than a sniper who, whilst concealed and protected by the foliage in which he hides, proceeds to take pot-shots at his unsuspecting opponent. He was not prepared to take on all the risks of a full battle and, when the event went against him, decided to change his role. Ought he to be permitted to do this? I think not: for both principle and authority are against him.

In *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95; [1957] 3 All ER 559; [1957] 3 WLR 830 the appellant claimed certain lands belonging to the respondent. Both were chieftains in what was then known as the Gold Coast, now Ghana. Some 16 years earlier, a chieftain subordinate to the appellant had laid claim to the same lands. That action had been decided in the respondent's favour. The appellant, who was the person really interested in those lands, had knowingly stood by while the earlier action was fought out. The Privy Council when affirming the decisions of the court below dismissing the appellant's claim, applied the principle formulated by Lord Penzance in *Wytcherley v Andrews* (1871) LR 2 P & D 327 at p 328 and stated in the following terms:

> There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be reopened.

Although those words were spoken in the context of a probate action concerning a will, the Privy Council considered it to be of universal application.

In my judgment, the principle adverted to a moment ago applies to the applicant before us. In saying this, I have not overlooked the provisions of O 53 r 2(5) which provides as follows:

> If on the hearing of the motion or summons the Court or Judge is of opinion that any person who ought to have been served with the notice or summons has not been served, whether or not he is a person who ought to have been served under paragraph (3), the Court or Judge may adjourn the hearing on such terms (if any) as it or he may direct in order that the notice or summons may be served on that person.

It is to be noticed at once that the power conferred by sub-r (5) only arises at the hearing of the substantive motion. And, it is limited to *service* of the

papers on parties who may be affected by any order that may be made. The person on whom the papers are served does not by reason of that service alone become a party to the proceedings.

On being served, it is up to him to decide whether to confine himself to an address if called upon by the judge, or to go further and apply to have himself added as a party to enable him to exercise all the rights and be subjected to all the burdens that are usually consequent upon such a course being taken. If he chooses the former course, then he has exhausted all that the law gives him and cannot appeal with or without leave. In order to exercise the right of appeal, he must go further and be added as a party.

Whatever may be the English practice, it does not apply here. In England, all prerogative orders are notionally sought for in the name of the Sovereign. The new procedure which provides for applications for judicial review (akin to and no doubt inspired by the much older procedure of writ petitions in the Indian Civil Procedure Code) has not altered the way in which applications are intituled and brought on the Crown side of the Queen's Bench Division.

In Malaysia, applications for prerogative orders are made inter partes the applicant and the authority whose decision or order is sought to be challenged with no reference to His Majesty, the Yang Di-Pertuan Agong. The only reference to the involvement of the State is contained in O 53 r 2(3) which calls for service of the papers on the Attorney General. Thus, resort to and reliance upon the English practice is particularly unhelpful and should not be had.

A plaintiff in an action or an applicant in any other originating proceeding is entitled to pursue his suit or proceeding against any party chosen by him and cannot be compelled to join as parties persons he has omitted from impleading: *Selvamary v G Rethinasamy* [1991] 1 MLJ 156. But any person who may be aggrieved by the decision of the court may intervene and apply to be added as a defendant or respondent. It is then for the judge in the exercise of his discretion to decide whether or not to allow such a course.

The applicant in the instant case having elected to confine himself to the limited right given to it by the Rules cannot now claim to have an independent right of appeal. He has no such right. The application being devoid of merit was, for these reasons, dismissed with costs.

Siti Norma Yaakob and **Mahadev Shankar JJCA** concurred.

Application dismissed.

Reported by Isabel Liong